A **WOOLLEY DEVELOPMENT SDN BHD**

v.

STADCO SDN BHD (NO 2)

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
JEFFREY TAN JCA
[CIVIL APPEAL NO: W-02-582-2010]
C 21 JUNE 2010

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Whether subject matter of judgment not stated - Statement of claim, whether of assistance in ascertaining judgment - Whether judgment so uncertain it* D *amounted to a nullity*

The respondent/plaintiff had obtained judgment against both defendants on 11 August 2004 in the High Court. In January 2009, some five years after judgment was entered, the respondent filed an E application in the High Court to try and enforce the said judgment. The second defendant responded by filing an application to declare the said judgment a nullity and to have it set aside. The judicial commissioner dismissed the second defendant's application, resulting in the present appeal.

F **Held (allowing the appeal with costs)**
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) It was apparent that, on the facts, the said judgment failed completely to state the subject matter of the judgment. A G judgment or order ought to be *ex facie* clear in its meaning for execution purposes without having to refer to any other document. However, this court, in fairness to the respondent, thoroughly read the respondent's statement of claim which unfortunately was poorly drafted and of no assistance in H ascertaining the said judgment. In the absence of relevant particulars being pleaded in the statement of claim and subsequently reproduced in the judgment, any judgment based on the prayers in the statement of claim would, as in the case here, be ambiguous and uncertain. The said judgment was so I uncertain that it was simply unenforceable. Therefore, it was plain and obvious that the said judgment ought to be set aside

ex debito justitiae as against the second defendant because it was so uncertain that it amounted to a nullity. (paras 5, 12, 13 & 17)

Bahasa Malaysia *Translation Of Headnotes*

Responden/plaintif telah memperolehi penghakiman terhadap kedua-dua defendan-defendan pada 11 Ogos 2004 dalam Mahkamah Tinggi. Pada Januari 2009, kira-kira lima tahun selepas penghakiman telah dicatatkan, responden memfailkan suatu permohonan dalam Mahkamah Tinggi untuk cuba menguatkuasakan penghakiman tersebut. Defendan kedua membalas dengan memfailkan suatu permohonan untuk mengisytiharkan penghakiman tersebut tidak sah dan untuk mengenepikannya. Pesuruhjaya kehakiman telah menolak permohonan defendan, mengakibatkan rayuan semasa.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Ia adalah jelas bahawa, berdasarkan fakta-fakta, penghakiman tersebut gagal sepenuhnya menyatakan isi penghakiman. Suatu penghakiman atau perintah sepatutnya *ex facie* jelas dalam maksudnya bagi tujuan pelaksanaan tanpa rujukan kepada apa-apa dokumen lain. Walau bagaimanapun, mahkamah ini, supaya bertindak adil terhadap responden, membaca dengan teliti pernyataan tuntutan responden yang malangnya tidak didrafkan dengan baik dan tidak menolong dalam menentukan penghakiman tersebut. Dengan ketiadaan butir-butir relevan diplidkan dalam pernyataan tuntutan dan kemudiannya dinyatakan semula dalam penghakiman, mana-mana penghakiman berdasarkan permintaan-permintaan dalam pernyataan tuntutan akan, seperti dalam kes semasa, merupakan tidak jelas dan tidak pasti. Penghakiman tersebut adalah sungguh tidak pasti sehingga ia tidak dapat dikuatkuasakan. Oleh itu, ia adalah jelas dan nyata bahawa penghakiman tersebut seharusnya diketepikan *ex debito justitiae* terhadap defendan kedua kerana ia begitu tidak pasti sehingga ia merupakan tidak sah.

Case(s) referred to:
Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***
Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor and Another Appeal [1996] 1 CLJ 141 FC ***(refd)***
Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

A *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 FC* ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [2000] 2 CLJ 833 FC ***(refd)***

Legislation referred to:
B Rules of the High Court 1980, O. 13 r. 6(3), O. 18 r. 15(1), O. 19 r. 7(3), O. 34 r. 7

For the appellant - Gan Techiong; M/s Gan & Lim
For the respondent - Pang Kong Leng; M/s Cheah Teh & Su

C *[Appeal from High Court, Kuala Lumpur; Suit No: S6-22-206-2002]*

Reported by Suresh Nathan

JUDGMENT

D

Abdul Malik Ishak JCA:

[1] In the High Court below the respondent was the plaintiff and had obtained judgment against both defendants on 11 August 2004. The appellant before us was the second defendant. Though the said judgment stipulated a deadline of 27 February 2005 for the second defendant to comply with the judgment, neither the second defendant nor the respondent took any action in respect of the said judgment when it fell due.

F **[2]** From p. 214 of the appeal record, we were surprised to notice that the respondent actually applied and obtained leave to amend its statement of claim on 7 August 2006, which was some two years after entering final judgment on 11 August 2004, but continued to do nothing about the said judgment.

G **[3]** In January 2009, some five years after judgment was entered, the respondent suddenly decided to file an application in the High Court below (see p. 138 appeal record) to try to enforce the said judgment. The subsequent steps taken by the respondent were H obviously irregular, for example issuing a Writ of Subpoena (see p. 196 appeal record) to require the second defendant's director to produce documents – as if for a trial. The second defendant responded, also in year 2009, by filing an application to declare the said judgment a nullity and to have it set aside. The second I defendant's application was dismissed by the learned Judicial Commissioner and hence this appeal. The said judgment was

obtained by the respondent purportedly pursuant to O. 34 r. 7 of the Rules of the High Court 1980 ("RHC"). My learned brother Jeffrey Tan Kok Wha JCA had pointed out during the course of submission that there is no provision under O. 34 of the RHC for a plaintiff to obtain judgment by filing a summons-in-chambers – as the respondent did – as if it was an application for default judgment under O. 13 r. 6(3) of the RHC or O. 19 r. 7(3) of the RHC. As the second defendant's appeal was concerned with the contents of the said judgment rather than any irregularity in obtaining judgment, we have proceeded to hear the merits of the second defendant's appeal.

[4] The judgment dated 11 August 2004 consisted of two parts; the first part was against the first defendant while the second part was against the second defendant. The part against the second defendant read as follows:

> DAN ADALAH PADA HARI INI DIHAKIMI TERHADAP DEFENDAN KEDUA bahawa:
>
> (a) suatu deklarasi bahawa Defendan Kedua memegang 192 bidang ("parcels") atas amanah konstruktif untuk Plaintif;
>
> (b) suatu perintah bahawa Defendan Kedua akan, dalam suatu tempoh masa yang munasabah dan di dalam apa keadaan pun pada atau sebelum 27 haribulan Februari 2005;
>
> (i) menyerahkan milikan kosong bagi 192 bidang ("parcels") tersebut kepada Plaintif;
>
> (ii) memohon untuk pecah-bahagi bangunan tersebut;
>
> (iii) mendapatkan pengeluaran hakmilik strata berasingan bagi 192 bidang ("parcels") tersebut;
>
> (iv) melaksanakan suatu pindahmilik pelaksanaan yang sah dan boleh di daftar bagi hakmilik strata berasingan untuk 192 bidang ("parcels") tersebut kepada Plaintif;
>
> (c) Gantirugi bagi konspirasi untuk ditaksirkan oleh Pendaftar;
>
> (d) Faedah atas gantirugi yang ditaksirkan (yang diberikan di bawah perenggan (c) di atas) pada kadar 8% setahun dari tarikh taksiran sehingga penyelesian penuh dan terakhir; dan
>
> (e) Kos.

[5] It is apparent that the said judgment failed completely to state the subject matter of the judgment. Though we were only concerned with the part of the judgment against the second defendant, it is pertinent to point out that the part of the judgment against the first defendant also did not state its subject matter with certainty. Learned counsel for the appellant had relied on the Federal Court grounds in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, to support the appeal before us. In *Tuan Haji Ahmed*, the plaintiff there had entered default judgment for (at p. 247):

> the said sum of RM4,923,242.69 at 31 March 1988 together with interest thereon at 1% above the prescribed rate which is the sum of the margin (as therein defined) and the base lending rate of the plaintiff on a daily rests from 1 April 1988 till the date of full realisation and costs on a solicitors and client basis to be taxed.

[6] The Federal Court perused the judgment and observed as follows (at p. 250):

> In particular, insofar as contractual interest at a fixed or constant rate is concerned, the default judgment does not specify sufficiently or at all:
>
> (a) the contract relied on for the claim for interest;
>
> (b) the meaning of the expressions 'margin', 'prescribed rate' and 'base lending rate' referred to therein;
>
> (c) the date from which contractual interest is owing;
>
> (d) the precise rate of interest fixed by the contract and the amount of contractual interest owing at the date of the issue of the writ; and
>
> (e) the precise rate of interest fixed by the contract and the total amount of contractual interest owing from the date of issue of the writ to judgment.

[7] The Federal Court then agreed with the defendant's contention that the default judgment was a nullity because the terms of interest payable (as stated in the default judgment) was ambiguous. The appeal was allowed and the default judgment was set aside despite a long delay in applying to set it aside. It was also held that since the judgment was a nullity, the delay in applying to set it aside was immaterial.

[8] The Federal Court also ruled that the High Court judge was wrong to look at the loan agreement in that case to try to resolve the ambiguity (at p. 251): A

> To take the point further, we note that the learned judge had referred to the loan agreement for the purpose of resolving the ambiguities in the default judgment with regard to the contractual interest payable thereunder in favour of the respondent. It would be wrong to assume that the learned judge was entitled to do so, … B

[9] The Federal Court further held (at p. 253): C

> We were thus satisfied that the appellant had demonstrated that on the face of it, the default judgment, insofar as liability thereunder, for the payment of contractual interest was concerned, did not specify sufficiently or at all, the several matters to which we have referred, and so was riddled with uncertainty, serious enough to render it an irregular judgment within the meaning of the authorities. D

[10] At the same page and spilling over to p. 253, the Federal Court further held: E

> We would add that under its inherent jurisdiction to prevent an abuse of its proceedings, the court has power to set aside a judgment in default, despite the defendant's application being out of time, if the particular circumstances of the case require the intervention of the court. (See *Beale v. McGregor* [1886] 2 TLR 311.) F
>
> By way of explanation for his delay in making his application to set aside the default judgment, the appellant had put forward the improbable explanation, which the judge had no hesitation in dismissing as 'ludicrous', that he had allowed judgment in default to go against him because he could not afford to engage solicitors. G Having regard to his business status and experience, we agreed with the judge that this was a 'ludicrous' explanation, and was therefore unacceptable. But, delay alone, having regard to the circumstances of the present case, was not necessarily fatal to the appellant's case.
>
> In our view, having regard to the principles enunciated above, on H when the court can condone delay on the part of a defendant, the tardiness or the laches of the appellant in making his application, to set aside the default judgment, was not fatal to his application, especially since, in our view, the default judgment was by reason of uncertainty, a nullity, and the amendment made by the judge to it I by deleting the words 'on monthly rests', did not cure that defect.

[11] As expounded above, the Federal Court ruled that it was not permissible to look at extrinsic evidence to attempt to resolve ambiguities in a judgment. This is actually common sense because a judgment ought to, on the face of it, be clear enough to enable compliance. In *Tuan Haji Ahmed,* the Federal Court held that the judgment which failed to define the calculation of interest with certainty was a nullity and could be set aside at any time *ex debito justitiae.*

[12] The respondent's counsel relied on *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [2000] 2 CLJ 833, a decision of the Federal Court, to submit that it is permissible to look at the pleadings, that is, the statement of claim to resolve uncertainties in a judgment. Though we hold the view that a judgment or order, ought to be *ex facie* clear in its meaning for execution purposes, without having to refer to any other document, we had, in fairness to the Respondent, thoroughly read the respondent's statement of claim. Unfortunately for the respondent, we found the statement of claim to be poorly drafted and of no assistance to ascertaining the impugned judgment. Paragraph 4 of the statement of claim merely stated that the first defendant was the registered proprietor of 9 lots of lands in Seberang Perai Utara, Penang. Paragraph 5 stated that those lands were at all material times charged to Malaysia Building Society Berhad ("MBSB"). Paragraph 6 mentioned 192 Sale and Purchase Agreements were made between the respondent and the 1st defendant for "192 parcels" or "48 units of 4 storey shop offices" in a project known as "Raja Uda Commercial Centre". However, no particulars whatsoever were pleaded as to which lots of lands were those "192 parcels" supposed to be built. At this juncture, it is necessary to state that the 2nd defendant was not a party to those agreements and would not have knowledge about the contents of the 192 Sale and Purchase Agreements. It must be noted that O. 18 r. 15(1) of the RHC reads as follows:

> A statement of claim must state specifically the relief or remedy which the plaintiff claims; but costs need not be specifically claimed.

[13] In the absence of relevant particulars being pleaded in the statement of claim and subsequently reproduced in the judgment, any judgment based on the prayers in the statement of claim would, as is the case here, be so ambiguous and uncertain. My learned brother KN Segara, JCA most succinctly described the said

judgment in these words: "the judgment is so uncertain that it is simply unenforceable". Learned counsel for the respondent conceded that there were no 192 buildings in existence as at the date of the judgment. In fact, we were told during submission that to this day they do not exist. Hence it was plainly wrong for the judgment entered on 11 August 2004 to declare the second defendant the "constructive trustee" of "192 parcels" – assuming that those "192 parcels" were intended to refer to 192 buildings. How could a judgment declare the ownership of non-existent subject matters? The irreparable defect in the impugned judgment is amplified by the fact that the second defendant was not the registered proprietor of any land. The statement of claim itself pleaded that those lands belong to the first defendant and are charged to MBSB. The respondent's cause of action against the second defendant was based on an allegation of "conspiracy to defraud". The basis of their allegation was that the second defendant had entered into contracts with the first defendant in September 2000 to develop those land belonging to the first defendant. The respondent's cause of action against the first defendant was for breach of contract, *albeit* of Sale and Purchase Agreements dated 6 January 1997 which required the first defendant to build and complete construction of buildings within 36 months, that was, by 5 January 2000. The chronology of events clearly showed that the second defendant entered the scene in September 2000, months after the 36 months contractual deadline between the respondent and the first defendant had expired. All that the respondent has was in reality a cause of action against the first defendant for breach of contract. In any event, there was no basis at all to obtain a declaration that the second defendant is a constructive trustee for the respondent of "192 parcels". Looking at the judgment alone, the words "192 parcels" could well be anything under the sun. The Supreme Court, in *Development & Commercial Bank Bhd v. Aspatra Corp Sdn Bhd & Anor and Another Appeal* [1996] 1 CLJ 141, held that a default judgment for a sum more than what was actually due ought to be set aside *ex debito justitiae*. It was held at p. 146:

> About the second reason of the learned judge in holding that the default judgment dated 8 July 1986 was in respect of a sum larger than was actually due, we were in entire agreement with it. The default judgment *ex facie* showed such a larger sum in regard to the interest of 18% pa from date of judgment to date of satisfaction when the then applicable O. 42 r. 12 of the Rules of the High

A Court 1980 (before its amendment on 12 December 1986), only allowed for the maximum rate of 8% pa on a judgment. For this reason alone, the default judgment ought to be set aside *ex debito justitiae* without the need to consider any further reason leading to the conclusion that the default judgment ought to be set aside.

B **[14]** In *Eu Finance Berhad v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37, the Federal Court held that an order which is a nullity may be disregarded. At p. 39 it was held:

> The general rule is that where an order is a nullity, an appeal is
> C somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's*
> D *Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
>
> E Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to
> F treat the act as void'.

[15] As mentioned earlier above, the respondent had obtained the said judgment irregularly by purportedly filing a summons-in chambers to apply to enter judgment under O. 34 r. 7 of the RHC. It is therefore relevant to note that in *Cheow Chew Khoon v. Abdul*
G *Johari bin Abdul Rahman* [1995] 4 CLJ 127, this court had occasion to reiterate the rule that the court always retain a discretion to set aside a judgment entered by default because it is not a judgment on merits. A default judgment must necessarily follow the prayers in
H the statement of claim. Otherwise the default judgment ought to be set aside. This court in *Cheow Chew Khoon v. Abdul Johari Abdul Rahman (supra)* held at p. 135:

> On my perusal of the prayers in the statement of claim and the default judgment taken, I agree with the submission of the learned
> I counsel for the appellant. The default judgment did not appear to reflect what was prayed for by the plaintiff in his statement of claim.

> With the default judgment the respondent is in fact getting more than what he prayed for. Once this is shown to be the case the judgment cannot be said to be a regular judgment. Therefore, I hold that the default judgment taken by the respondent is an irregular judgment and ought not to be allowed to subsist. That being the case, the appellant is entitled to have it set aside *ex debito justitiae*.

[16] Though the respondent was seeking a declaration on the ownership of land which the respondent well knew are charged to MBSB, it had also failed to name MSSB as a party in the civil suit. The conclusion must be that the respondent was aware it has no reasonable cause of action against MBSB. Learned counsel for the respondent also submitted that the second defendant knew what those "192 parcels" were all about when its director was cross-examined in year 2009. With respect, the issue is whether the impugned judgment *ex facie* was uncertain and unenforceable as at its date of 11 August 2004 in failing to state its subject matter. Subsequent events in the year 2009 or the question of whether the second defendant was subsequently informed about the subject matter of the impugned judgment are irrelevant.

[17] For the reasons adumbrated above, it is plain and obvious that the impugned judgment in our present case ought to be set aside *ex debito justitiae* as against the second defendant because it is so uncertain that it amounts to a nullity. Hence, we ruled that the said judgment dated 11 August 2004 must be set aside. During submission, the appellant's counsel mentioned to us their intention to apply to transfer the proceedings to the High Court at Penang on the ground that the subject matter concerns land situated in Penang. We made no order to transfer because such an application to transfer ought to be heard by the High Court below and not by us. It is up to the appellant to file an appropriate application at the High Court below. Hence, we unanimously allowed the appellant's appeal with costs in the cause, reversed the decision of the High Court delivered on 8 February 2010 which dismissed the appellant's application, ordered the deposit to be refunded to the appellant and that the disposal of the civil suit at the High Court to be expedited.